NO. 84824-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF TACOMA, a municipal corporation,

Appellant,

v.

CITY OF BONNEY LAKE, CITY OF FIRCREST, CITY OF UNIVERSITY PLACE, CITY OF FEDERAL WAY, PIERCE COUNTY and KING COUNTY,

Respondents.

RESPONDENTS' ANSWER TO BRIEF OF AMICUS CURIAE WASHINGTON WATER UTILITIES COUNCIL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

Respondents City of Fircrest, City of University Place, City of Federal Way, and Pierce County urge this Court to reject the arguments raised by Amicus Washington Water Utilities Council (WWUC). WWUC adds nothing new to the debate.[1] Like Tacoma, it essentially asks this Court to rule that a municipal utility can never negotiate a contract whereby it agrees to provide fire suppression services as consideration for benefits gained from the franchise. This Court should resist the invitation to interfere with duly-negotiated franchise agreements, adopted pursuant to Tacoma's proprietary decision-making authority. The trial court's decision to dismiss Tacoma's lawsuit was entirely correct and should be upheld.

II. COUNTER STATEMENT OF THE CASE

Respondents incorporate by reference their Statement of the Case contained in the Brief of Respondents, and further answers WWUC's factual statement as follows:

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[1] While WWUC adds little to the legal arguments already before the Court, WWUC's members do represent a different constituency than TPU. WWUC has as members both public and private water systems. The fact that private water systems may be affected by this case underscores that the provision of utilities is a proprietary function, and that the Court should give deference to duly-negotiated franchise agreements with public and private utilities alike. In addition, the presence of private water utilities, which have no taxing authority, demonstrates that the "tax vs. fee" debate does not fully answer the relevant questions in this lawsuit: whether it is permissible for any utility, public or private, to negotiate a franchise in which fire suppression costs are part of the consideration.

WWUC has mischaracterized the "central question" of this appeal. WWUC presents the issue as one solely pertaining to the indemnity language in Respondents' franchise agreements with Tacoma Public Utilities (TPU). Amicus Brief at 6 ("[In *Lane v. City of Seattle*] this Court did not reach the central question in the present case: whether indemnity clauses in franchise agreements effectively transfer responsibility for hydrant-related costs back to the utility.")

Indemnity is not the "central question." Rather, the fundamental issue is whether Respondents' franchise agreements, of which the indemnity provisions are a part, prohibit TPU from extracting monetary consideration for fire hydrants during the life of these franchises. Because a franchise is a binding contract, and because the Court lacks authority to add terms to a contract that the parties did not choose to adopt during negotiations, the answer to this question is yes.

III. ARGUMENT

A. WWUC over-reads the broad language of *Lane*.

In *Lane v. City of Seattle*, 164 Wn.2d 875, 194 P.3d 177 (2003), this Court stated, "Fire hydrants are a governmental responsibility for which the general government of the area must pay." *Id.* at 891. WWUC's entire argument rests upon that single statement. However, that broad pronouncement from *Lane* does not prohibit an arrangement in which

general governments—in this case, the Respondents—compensate a utility for providing fire suppression services by allowing free use of the streets and other consideration.

In addition, *Lane* does not require that ratepayers never foot the bill for fire hydrants. In *Lane*, this Court expressly ratified a financial scheme in which the City of Seattle raised the utility tax on SPU to pay for fire suppression, and SPU raised its rates to cover the utility tax. *Lane*, 164 Wn.2d at 886-87. In doing so, this Court firmly rejected arguments that such a scheme was an end-run around the Court's earlier decisions. *Id.* ("The law is not that Seattle must charge for hydrants to a broad range of taxpayers.").

Thus, the broad proposition that "fire hydrants are a general government responsibility" does not settle the debate. The proposition does not prohibit an arrangement by which a valuable franchise is exchanged for fire suppression services, and it does not prescribe from whose pocket fire suppression expenses ultimately come. Here, as in *Lane*, TPU may recoup its business expenses, including contract consideration, through rates, even if the end result is that rate payers are paying for fire hydrants.

B. *Lane* does not restrict the exercise of franchising authority.

In addition, *Lane* did not address the situation where parties have an existing, binding contract, like the franchises in this case. Lake Forest Park did not have a franchise agreement with SPU, and so this Court determined that Lake Forest Park had to pay. *Lane*, 164 Wn.2d at 889-90. But the *Lane* trial court dismissed the City of Shoreline and King County on summary judgment, finding that their franchise agreements indicated SPU's intent to "waive" compensation for fire hydrants. CP 420-21. That decision was not appealed.

The presence or absence of a franchise is a meaningful distinction. A franchise is a contract. *Burns v. City of Seattle*, 161 Wn.2d 129, 154-55, 164 P.3d 475 (2007). A franchise does not spontaneously arise just because a municipality happens to have its infrastructure in another's right-of-way; rather, the granting of a franchise is a deliberate exercise of contracting and statutory authority. *See* RCW 35A.47.040, 36.55.040 (establishing strict procedural requirements for adoption of ordinances granting franchises). Franchise agreements are carefully, deliberately crafted because municipalities have free reign to negotiate any contractual terms deemed

economically beneficial. *Hite v. Pub. Util. Dist. No. 2*, 112 Wn.2d 456, 460, 772 P.2d 481 (1989).[2]

In this lawsuit, Tacoma asks this Court to bless the attempted violation of its contracts. All the Respondents have written, binding franchises with TPU. CP 190-200, 202-222, 224-243, 250-276. Pursuant to these franchises, TPU historically has not charged the Respondents for fire hydrants within their jurisdictions. At the time these franchises were accepted, the parties had a meeting of the minds. The understanding on both sides was that the provision of water service would include fire suppression. To saddle the Respondents with that obligation now would be to add a term to the franchise agreements that the parties did not negotiate for themselves. *See* David K. DeWolf et al., 25 Contract Law and Practice § 5.4 (2d ed. 2007), citing *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 991 P.2d 1120 (2000). *Lane* does not require this Court to contradict its own precedent for construing contracts, nor to declare duly-enacted franchise agreements void, nor to prohibit municipalities from negotiating mutually-beneficial franchises in the future.

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[2] Amicus lobbies at length for this Court to recognize public utilities' broad discretion in setting rates and charges. Amicus Brief at 16-18. But it would be incongruous for this Court to recognize broad proprietary authority to set charges, while simultaneously stifling broad proprietary authority to set mutually-beneficial terms for a franchise. If TPU has "broad discretionary authority" to determine which costs are attributable to fire suppression, then it has broad discretionary authority to allocate such costs to its rate-payer base, to the extent such costs serve as compensation for a franchise.

WWUC suggests that, prior to *Lane*, the parties could not have known to address the fire suppression compensation in their franchise agreements. Amicus Brief at 2 (emphasizing that franchise agreements "pre-date this Court's decision in *Lane*"). Yet, even though *Lane* had not yet been decided when these franchises were negotiated, nothing prohibited TPU from requesting that the Respondents pay compensation for fire hydrants. As Tacoma has insisted, *Lane* did not change the law. Brief of Appellant at 25 n. 3. The fact remains that TPU voluntarily assumed financial responsibility for all costs of the water system, including all accessories and appurtenances (such as fire hydrants), in consideration for a franchise. *See, e.g.*, CP 191, 225. Fire suppression is inseparably linked to the water system as a whole. CP 86. Thus, in signing the franchises, TPU assumed the obligation to pay for fire suppression.

C. Respondents' franchises are economically-balanced and mutually beneficial.

In *Burns*, this Court confirmed the long-standing principal that local governments, when acting in their propriety capacity as utility providers, are presumed to make contracts that serve their own economic self-interest. *Burns*, 161 Wn.2d at 156 ("Presumably, such a voluntary exchange will enhance, not impair, a utility's ability to provide cost-effective service to its customers . . . ."). In addition, in *Burns* this Court upheld the proposition

that ratepayers can foot the bill for contract consideration paid by the utility. *Id.* at 138 ("SCL treats the payments as an operating expense and factors the expense into the rates charged to all of its customers. In exchange, the Cities have not formed their own electric utilities.").

Lane's broad language, which allocates the obligation of fire suppression services to general governments, must be harmonized with this Court's decision in *Burns*. The Court must presume that when TPU negotiated these franchise agreements with the Respondents, it saw economic benefit in an arrangement by which it provided fire hydrants as part of a franchise agreement. *Burns*, 161 Wn.2d at 144 (noting that a franchise is a valuable right which is typically exchanged for compensation such as a franchise fee or utility services). To state now that the Respondents must pay TPU for fire hydrants would unbalance the deal, handing Tacoma a windfall at the Respondents' expense.

D. Billing rate-payers for business expenses related to fire hydrants is not an illegal "tax."

WWUC's assertion that enforcing the existing terms of the franchises would foist an illegal "tax" on rate-payers rings hollow. *Lane* does not foreclose a utility from ultimately recovering the costs of fire hydrants from its ratepayers. *Lane*, and *Okeson* before it, requires that a municipality

follow proper procedures, if in fact a tax is being enacted. *Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003).

In addition, the WWUC overplays its hand in suggesting that a decision favorable to the Respondents would force utilities to charge ratepayers for hydrant-related costs. Amicus Brief at 11 ("The logical and exclusive outcome of the Respondents' position is that the utilities will be forced to charge ratepayers for the hydrant-related costs."). Merely determining that a utility may recoup the consideration granted for a franchise—that is, fire suppression services—does not force a utility to do so. Different utilities may adopt different financial solutions. Some may find that it makes sense for receiving jurisdictions to compensate them for fire suppression. Some may find that fire suppression services are consideration for the franchise, such that the costs are an appropriate ratepayer expense. Others, finding fire suppression costs to be *de minimis* in their jurisdictions, may choose simply to absorb the costs. As WWUC points out, utilities have broad discretion over their own finances. This Court should honor that discretion in this case.

Amicus unfairly attributes to Respondents a sinister motive by suggesting that they are advocating for TPU to "cook the books." Amicus Brief at 8 ("Respondents' answer to this dilemma is for the utilities to

continue to collect hydrant-related costs from ratepayers but to re-characterize those costs as 'business expenses.'"). Such statements entirely misread the Respondents' arguments. When provided to a receiving jurisdiction in exchange for a valuable franchise, the cost of fire suppression is, was, and always will be a business expense. No "re-characterization" is required. Even if expenses were re-characterized, TPU would not be "cooking the books" any more than SPU was "cooking the books" in *Lane*.

E. The indemnity provisions of the franchises transfer the costs for fire hydrants back to the utility.

WWUC adds little to the discussion about whether the indemnity provisions are broad enough to transfer the costs of fire suppression back to TPU. As extensively explained in the Respondents' Brief, these clauses evidence a clear intent for the Respondents to be held harmless from <u>all</u> costs arising from TPU's presence within their jurisdictions. But for the TPU water mains, there would be no TPU fire hydrants in Federal Way, Fircrest, University Place, or Pierce County. As a result, but for the franchises, the Respondents would not have received bills from TPU. There could be no doubt that the costs of fire suppression arise out of these franchises and therefore fall under the indemnity clauses. The trial court's decision on this ground was correct.

IV. CONCLUSION

For the foregoing reasons, the Respondents respectfully request that this Court reject the arguments raised by WWUC and the City of Tacoma and uphold the trial court's grant of summary judgment to the Respondents.

RESPECTFULLY SUBMITTED this 2nd day of September, 2011.

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Attached for filing is a copy of the Respondents' Answer to Brief of Amicus Curiae Washington Water Utilities Council; and Certificate of Service.

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